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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 766.

THE TRAVELERS FIRE INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

RANNEY-DAVIS MERCANTILE COMPANY, A CORPORATION, RESPONDENT.

NEW YORK UNDERWRITERS INSURANCE COMPANY, A CORPORATION, PETITIONER,

VS.

RANNEY-DAVIS MERCANTILE COMPANY, A CORPORATION, RESPONDENT.

GRAIN DEALERS NATIONAL MUTUAL FIRE INSURANCE COMPANY, A CORPORATION; PENNSYLVANIA MILLERS MUTUAL FIRE INSURANCE COMPANY, A CORPORATION; MILLERS MUTUAL FIRE INSURANCE ASSOCIATION OF ILLINOIS, A CORPORATION; MICHIGAN MILLERS MUTUAL FIRE INSURANCE COMPANY, A CORPORATION; WESTERN MILLERS MUTUAL FIRE INSURANCE COMPANY, A CORPORATION; AND THE MILLERS MUTUAL FIRE INSURANCE COMPANY, A CORPORATION, PETITIONERS,

VS.

RANNEY-DAVIS MERCANTILE COMPANY, A CORPORATION, RESPONDENT.

BRIEF OF RESPONDENT, RANNEY-DAVIS MERCANTILE COMPANY, IN OPPOSITION TO THE PETITION FOR CERTIORARI.

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OPINION BELOW.

The opinion of the United States Court of Appeals for the Tenth Circuit on these cases affirmed a judgment of

the District Court of the United States for the District of Kansas.

Not all of the questions involved in the appeal to the United States Court of Appeals for the Tenth Circuit are involved here.

The questions involved in this Application for a writ of certiorari arise over the motion to quash service of summons on the Commissioner of Insurance, the statutory process agent, designated by petitioners in their application for permission and authority to transact business in Kansas.

The Honorable Royce H. Savage overruled petitioners' motion to quash the service of summons (R. 38-39). This order overruling the motion to quash was sustained by the Honorable Arthur J. Mellott before whom the cases were tried (R. 73).

The United States Court of Appeals for the Tenth Circuit sustained these orders (R. 345-6).

The opinion of the United States Court of Appeals for the Tenth Circuit has not been officially published, but is found in the Record, pages 339-352.

JURISDICTION.

The jurisdiction of this Court is sought by the petitioners on the grounds that the decision of the United States Court of Appeals for the Tenth Circuit is—

(1) "In conflict with local law,"

(2) "In conflict with decisions of other Circuit Courts,"

and

(3) "In conflict with the decisions of the Supreme Court of the United States" (Petition for Writ, pp. 8 and 9).

QUESTIONS PRESENTED.

The question presented is whether a resident of Kansas, named as the insured in a policy of insurance, issued in another state and covering property located in such other state can maintain an action in Kansas for loss and damage sustained to that property, within the terms of the policy, by service of process on the Commissioner of Insurance of the State of Kansas.

Stated in another form—

Does the written consent, which by statute a foreign insurance company must file, and which petitioners in these cases did file, with the Insurance Department of Kansas, stipulating "That action may be commenced against such company * * * in the proper court of any county in this state in which the cause of action shall arise *or* in which the plaintiff may reside, by service of process on the Commissioner of Insurance of this state," limit the right of such plaintiff to suits on policies of insurance covering property located in Kansas?

STATEMENT.

Each suit was to recover loss and damage to a business building used as a warehouse and distributing center of the Respondent, plaintiff in the case. The building was located at Woodward, Oklahoma.

The building was practically destroyed by a tornado which occurred April 9, 1947, about eight o'clock p. m.

1. The Respondent, Ranney-Davis Mercantile Company, was incorporated under the laws of Kansas, with its head office and principal place of business at Arkansas City, Cowley County, Kansas, which was the county where the suits against Petitioners, Grain Dealers National Mutual Fire Insurance Company *et al.*, were filed, and which was in the division of the United States District Court for Kansas where the other two suits were filed.

2. The Petitioners were each foreign corporations, that is, they were incorporated under the laws of a state other than the state of Kansas.

3. At all times material to the cases, each petitioner was duly authorized to transact its business in Kansas, and to obtain such authority had filed its "written consent, irrevocable, that actions may be commenced against" it "in the proper court of any county in this state in which the cause of action shall arise *or* in which the plaintiff may reside, by the service of process on the Commissioner of Insurance of this state, and stipulating and agreeing that such service shall be taken and held in *all courts* to be as valid and binding as if due service had been made upon the president or chief officer of such corporation" (R. 71).

4. The policies, in case of loss or damage, were payable to Ranney-Davis Mercantile Company.

5. The policies were kept in the head office at Arkansas City, Kansas (R. 114).

6. The policies were written in Oklahoma, on Oklahoma forms.

7. The premiums were paid by checks issued and sent from the head office in Arkansas City, Cowley County, Kansas (R. 114).

8. The notice of loss and proofs of loss were prepared in, and sent from the head office in Arkansas City, Cowley County, Kansas (R. 114-115).

9. The petitioners demanded under the policies, and were granted, the right to examine the insured, under oath, at the head office of the Ranney-Davis Mercantile Company in Arkansas City, Cowley County, Kansas (R. 158).

10. All correspondence between Petitioners and Respondent concerning payment of the loss was sent from, and addressed to, Ranney-Davis Mercantile Company, Arkansas City, Kansas.

Under these facts, which were not even in dispute, the Honorable Royce H. Savage determined that the suits were brought in the county and district where plaintiff, Respondent here, resided, and in the county and district where the causes of action arose.

On the same facts the Honorable Arthur J. Mellott determined that the suits were brought in the county and district where plaintiff, Respondent here, resided.

The United States Court of Appeals for the Tenth Circuit decided that the suits were brought in the county and district where the plaintiff, Respondent here, resided and where the cause of action arose.

They all agreed that the proceedings were within the plain terms of the Statute, and that the Supreme Court of Kansas had so interpreted or construed the Statute.

ARGUMENT.

The first question then is:

A. "Is the decision of the United States Court of Appeals for the Tenth Circuit in conflict with the Statutes of Kansas and the decisions of the Supreme Court of Kansas construing these Statutes?"

The answer to this question depends on whether the United States Court of Appeals for the Tenth Circuit gave a construction to the Kansas Statute providing for service on foreign insurance companies which was in conflict with the construction given to the same Kansas Statute by the Supreme Court of Kansas.

This section of the Statute, the construction of which is involved in these cases, is G. S., 1935, 40-218, and was in force and effect at all times material to these cases. It provides that before a foreign insurance company shall be authorized to transact business in Kansas, it:

> "Shall file in the Insurance Department its written consent, irrevocable, that actions may be commenced against such company, or fraternal benefit society, in the proper court of any county in this state in which the cause of action shall arise, or in which the plaintiff may reside, by the service of process on the Commissioner of Insurance of this state, and stipulating and agreeing that such service shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or other chief officer of such corporation."

Petitioners' quotation of the Statute is not quite accurate, in that the Statute uses the term "other chief officer," instead of the term "secretary."

This Statute, in substantially this form, has been on the Statute books of Kansas since 1875.

It will be observed that it provides for, and authorizes service of process on the Commissioner of Insurance, in either one of two conditions:

(1) When the suit is brought "in the proper court of any county in this state in which the cause of action shall arise, or,"

(2) When the suit is brought "in the proper court of any county in this state in which the plaintiff may reside."

The petitioners' claim, in substance, is that this Statute of Kansas authorizes service of process on the Commissioner of Insurance in a suit against a foreign insurance company, which has filed its statutory consent, *only* on a cause of action which arises in Kansas, regardless of the fact that plaintiff is a resident of Kansas.

Respondent's contention is that a resident of Kansas has the right to bring his action either in the county where plaintiff resides, regardless of where the cause of action arose, or in the county where the cause of action arose.

Respondent's further contention is that the suits were brought not only in the county where plaintiff resided, but also in the county where the cause of action arose.

There was no dispute of the fact that the suits were brought in the county or district where plaintiff resided. It was alleged in the complaint (R. 4) and admitted in the answer (R. 39).

That Statute says in about as plain terms as can be used, that service of process may be had on the Commissioner of Insurance if the suit is filed in the "proper court

of the county of this state in which plaintiff resides." There is no condition attached regarding where the cause of action arose.

In equally plain terms it says that service of process may be had on the Commissioner of Insurance, if the suit is filed in the "proper court of the county of this state in which the cause of action shall arise." Under that clause there is no condition attached as to where the plaintiff may reside.

This is the construction given to the Statute by the Supreme Court of Kansas and by the United States Court of Appeals for the Tenth Circuit.

In the case of *Shearer* v. *Insurance Co.*, 106 Kan. 574, 189 Pac. 648, decided in 1920, and relied on strongly by petitioners, the Supreme Court of Kansas specifically stated that under the above Sec. 40-218, G. S. Kansas, Annotated, 1935, the plaintiff could maintain his action in Kansas, by service of process on the Commissioner of Insurance, then called Superintendent of Insurance, in either the county of plaintiff's residence, or in the county where the cause of action arose, saying:

> "Manifestly, therefore, in order for a plaintiff to avail himself of this Statute, *one of two conditions must exist*, either he must be a resident of the state and of the county where the action is brought, or the cause of action must have arisen in that county" (p. 577) (emphasis supplied).

If the Statute needed any construction, here was a plain construction by the Supreme Court of Kansas, that upon the existence of either one of two conditions—suit brought in the county of the residence of the plaintiff, or suit brought in the county where the cause of action arose —service could be had on the Commissioner of Insurance.

Purpose of the Statute.

The Supreme Court of Kansas has stated the purpose of the Statute.

The purpose of this statute is to provide residents of Kansas with a local forum where they can carry on their litigation with foreign insurance companies, authorized to transact business in Kansas.

This purpose is well and clearly stated in *Life Association* v. *Boyer*, 62 Kan. 31, 41, 61 Pac. 387, where the Court said:

> "The purpose of the statute was to provide our own citizens with a local forum for the trial of controversies with foreign life insurance companies during the time such companies were enjoying the privilege of being allowed to transact business within our jurisdiction under the favor and protection of our laws, with the like privilege to citizens of other states to resort to the same forum during the same period of time, and perhaps, though it is not necessary for the purposes of this case so to decide, to provide our citizens a local forum in which, after the withdrawal or expulsion of foreign life insurance companies, to sue on contracts made by them during the period they transacted business here."

To the same effect is—

State v. *Harvester Co.*, 79 Kan. 371, 375-6, 99 Pac. 603.

Plaintiff's Right of Election As to Forum.

Under the statute plaintiff had the right of election to file its suit in either one of two forums—in the county or district where plaintiff resided, or in the county or district where the cause of action arose.

In these cases the county or district in each alternative was the same.

> "A litigant is entitled to choose the forum in which he will sue his adversary and he may consult his own convenience in respect thereto."
> *Root Grain Co.* v. *Livengood,* 151 Kan. 706, 708-9, 100 Pac. 2d 714.

There has also, for many years, been in force and effect in Kansas, another Statute, G. S., 1935, 60-507, reading:

> "An action, other than one of those mentioned in the first three sections of this article, against a non-resident of this state or a foreign corporation, may be brought in any county in which there may be property of, or debts owing to, said defendant, or where said defendant may be found; but if said defendant be a foreign insurance company, the action may be brought in any county where the cause, or some part thereof, arose."

The first three sections related to local actions, such as those involving real estate, fines and forfeitures, and actions against public officers.

This section is sometimes referred to in the decisions of the Supreme Court of Kansas, as Sec. 53 of the Code. It is a part of Article 5 of the Code of Civil Procedure.

It is well settled in Kansas that the Courts of that state will entertain suits against foreign corporations, authorized to do business in Kansas, even though the cause of action did not arise in Kansas.

The case of *German Ins. Co.* v. *First Natl. Bank,* 58 Kan. 86, 89-90, 48 Pac. 592, 594, involved the right to sue in the courts of Kansas, a foreign insurance company authorized to transact business in Kansas, on a cause of action which arose in another state.

The Court said, on pages 89 and 90:

> "Nor is it essential that the contract sought to be enforced should have been entered into in this state. For the purpose of transacting the business for which it was created, the company resided here as well as in the state of Illinois, and is as much subject to our laws and the jurisdiction of our courts as any other corporation carrying on business here."

It held that service on "the chief officers of the agency" for the company in Kansas was good service on the company.

The written consents of the petitioners, filed as a condition precedent to their right to transact business in Kansas, stipulated and agreed, that service of process on the Commissioner of Insurance "shall be taken and held in all courts to be as valid and binding as if due service had been made upon the president or *other chief officer*" of petitioners.

The Plaintiff a Resident of Arkansas City, Cowley County, Kansas.

Respondent, in the case now before the Court, was a resident of the State of Kansas and of the county and district where the suits were brought, which complied with "one of two conditions (which) must exist," as stated by the Supreme Court of Kansas, to authorize service of process on the Commissioner of Insurance.

This was alleged in the complaint (R. 4) and admitted in the Answer (R. 39).

> "For the purpose of federal jurisdiction a corporation has its domicile where it was incorporated

and not elsewhere, regardless of where its principal place of business may be located."

U. S. et al. v. *Onsky Pet. et al.*, 164 F. 2d 741.
Sims Oil Co. v. *Wolfe*, 6 F. 2d 504, 506.
Anderson v. *Standard Acc. Ins. Co.*, 36 Fed. Supp. 7, 10.

The service of summons in the case of *Shearer* v. *Ins. Co., supra,* was quashed on the sole ground that the plaintiff was not a resident of, nor did the cause of action arise in, the county where the suit was brought. The plaintiff resided in another state, and the Court held that the cause of action, which consisted of failure to pay what he claimed was due him, arose where he resided.

This is clearly shown by a quotation from the decision on page 578, where the Court said:

> "Whether or not the attempted withdrawal of the defendant from the state would have prevented jurisdiction over it from being acquired by service on the insurance superintendent, if the plaintiff had been a resident of Wyandotte County, Kansas, or if the cause of action had arisen in that county, it is clear that *such service could not be effective without the existence of one or the other of these conditions, and for that reason the motion to quash should have been sustained*" (emphasis supplied).

The quotation from this case at the bottom of page 9 and top of page 10 of Petition for Writ is not correct. The Court made no such statement as the law of Kansas. What it did say, was:

> "It has been said that statutes providing for the service of summons upon a foreign corporation by the delivery of a copy to a public officer are intended for the benefit of residents of the state and are not available to non-residents (12 R. C. L. 113; 21 R. C. L.

1345) and also that in order for effective service to be had in such manner the cause of action must have arisen in the state (*Simon* v. *Southern Railway Co.*, 236 U. S. 115; 12 R. C. L. 115; 21 R. C. L. 1345). To the contrary see 21 R. C. L. 1345-1346."

The Supreme Court of Kansas instead of stating a proposition of settled law, applicable in Kansas, was stating the divergent views of other authorities.

That the quotation as given by Petitioners in their brief is not the law in Kansas is clearly shown by what is said by the Supreme Court of Kansas in the case of *Mystic Legion* v. *Brewer*, 75 Kan. 729, 90 Pac. 247. Service of process was made on the Superintendent of Insurance, and motion to quash overruled. In affirming the ruling the Supreme Court said:

> "Another objection to the jurisdiction of the trial Court which is insisted upon is based on the fact that both plaintiff and defendant were nonresidents of the state when the action was commenced, and that the cause of action arose outside the state. The answer to this is that the defendant, which incorporated under the laws of another state, had, before the action was commenced, voluntarily entered the state for the purpose of conducting its corporate business in the state and in compliance with our statute had submitted itself to the processes of the courts of the state as fully and to the same extent as if it were in fact a resident of the state" (p. 732).

It should be said that this suit was against a fraternal insurance corporation. At that time, the Statute which provided for foreign fraternal corporations obtaining authority to transact business in this state, did not contain the clause, or any similar clause, limiting the right to obtain service on the superintendent of insurance, to suits

brought in the county of plaintiff's residence or where the cause of action arose.

The decision does dispose of Petitioners' incorrectly quoted portion of the opinion in the Shearer-Ins. Co. case. What the Court actually said is found near the bottom of page 576.

Except for the limiting clause now in the statute, which includes fraternal corporations, service of process would be authorized on the Commissioner of Insurance in suits brought by non-residents on causes of action arising in another state.

We shall, later in this brief, show that the cause of action arose at the residence of the Respondent, which was in Arkansas City, Cowley County, Kansas, the county and district in which the suits were filed, but under this decision in the Shearer-Insurance Company case, the Respondent was within its statutory right in bringing the actions in the county and district in Kansas where it resided and obtaining service of process on the Commissioner of Insurance.

In the quite recent case of *State ex rel.* v. *Ancient Order of United Workmen*, 161 Kan. 437, 168 Pac. 2d 523, the Court has clearly stated that the decision in the Shearer case, was based on the fact that plaintiff did not reside in, nor did his cause of action arise in the county where the suit was filed.

It is there stated:

> "Appellee cites *Novak* v. *Ins. Co.*, 103 Kan. 778, 176 Pac. 654, and *Shearer* v. *Ins. Co.*, 106 Kan. 574, 189 Pac. 648, relative to the subject of jurisdiction. They are not in point. *In these cases the cause of action did not arise, nor did plaintiff reside in the*

county where the actions were filed" (emphasis supplied).

The Suits Were Brought in the County Where the Cause of Action Arose.

In addition to coming within the second alternative of the Statute, the Respondent, in filing these suits, comes within the first alternative of the Statute; that is, the actions were "commenced against such company in the proper court of any county in this state in which the cause of action shall arise."

The actions were based on policies of insurance, payable to the Ranney-Davis Mercantile Company, a Kansas corporation, with head office and principal place of business in Arkansas City, Cowley County, Kansas (R. 114).

Checks in payment of premiums were executed and sent from the head office of Ranney-Davis Mercantile Company in Arkansas City, Kansas (R. 114).

Notices of loss and proofs of loss were prepared and sent from the head office of Ranney-Davis Mercantile Company in Arkansas City, Kansas (R. 115).

After the loss and prior to the time the suits were brought the Petitioners, acting under authority of a provision of the policies, served notice on Ranney-Davis Mercantile Company to produce, at its office in Arkansas City, Kansas, all books, records, invoices, checks and every instrument of any kind affecting or relating to the business of the Ranney-Davis Mercantile Company, or pertaining to the property covered by the policies, and to produce for examination an officer of the company (R. 35).

All correspondence carried on by Ranney-Davis Mercantile Company, with the adjusters for petitioners was

written at the head office of the company in Arkansas City, Kansas.

All correspondence from the petitioners and adjusters was addressed to the Ranney-Davis Mercantile Company at Arkansas City, Kansas.

While the issuance of the policy, the loss, the notice and proof of loss, subjection to examination by the insured, and correspondence were all essential and vital facts without which there could be no cause of action, the cause of action was the default of petitioners to make payment when due, and this occurred where payment should have been made.

This is well stated by the Supreme Court of Wisconsin, speaking through Justice Winslow, in *Rosley* v. *Wisconsin Odd Fellows,* 86 Wis. 463, 57 N. W. 48, where it is said:

> "As was said in *Brail* v. *Association,* 72 Wis. 430, 39 N. W. 529, the words 'cause of action,' 'include the act or omission without which there would be no cause of action or right of recovery.' Of course, the making of the contract, the payment of the premiums, the death of the assured, the furnishing of the proofs of death, are all essential and vital facts, without which there would be no cause of action, but even with all these facts no cause of action would be complete until 90 days had passed after the receipt of proofs without payment. It was the default in payment within the 90 days which made the cause of action perfect. Prior to this default an action would have been premature. This default took place in LaCrosse County, because by the contract and by-laws of the company the check was to be delivered to the beneficiaries, and as they were continuously residents of LaCrosse, that delivery was to take place in LaCrosse County."

The Supreme Court of Kansas in *Bruner* v. *Martin*, 76 Kan. 862, 93 Pac. 165, has established the same rule in Kansas, saying:

> "The phrase 'cause of action' has often been defined. It cannot exist without the concurrence of a right, or duty and a default, or, stated differently, an obligation must exist upon one party in favor of the other, the performance of which is refused."

The Court then states that "it would be difficult to find a better or more apt statement of where and when a cause of action arises," than in a certain English case, where it is said:

> "Now, the cause of action must have reference to some time as well as some place; does then the consideration of the time when the cause of action arises give us any assistance in determining the place where it arises? I think it does. The cause of action arises when that is not done which ought to have been done, or that is done which ought not to have been done. But the time when the cause of action arises determines also the place where it arises; for when that occurs which is the cause of action, the place where it occurs is the place where the cause of action arises."

The Court then clearly states that:

> "the place where it (the cause of action) arises is the place where some Court has jurisdiction of the subject matter and the party against whom the cause of action has arisen. The cases referred to *holding that the cause of action arises where the contract was entered into ignore the true definition of a cause of action, and confuse it with the subject of the action.* The execution of the note is but a part of the transaction out of which the cause of action arises; the failure to keep the obligation and to perform the promise is the main thing which creates the cause of action, and unless

there be such failure no cause of action ever arises" (emphasis supplied).

This same English authority, referred to in this Kansas case, was approved in

Anglo-American Land Co. v. *Lombard,* 132 Fed. 721 (C. C. A. 8).

Even in the case of *Shearer* v. *Ins. Co.,* 106 Kan. 574, 577, 189 Pac. 648, so strongly relied on by petitioners, the Supreme Court of Kansas held that the cause of action on an insurance policy arose at the residence of the plaintiff, saying:

> "A cause of action upon a contract does not arise until there has been a breach (Citing) and it arises where the breach takes place. The only breach of the contract alleged in the petition was the refusal to pay the amount due under it, and this occurred, *presumptively at least, at the residence of the plaintiff,* and not in Wyandotte County," where the suit was brought (Emphasis supplied).

It is stated in *Swift* v. *Clay et al.,* 127 Kan. 148, 149, 272 Pac. 170, that:

> "It is not the making, execution and delivery of the note which gave rise to the cause of action; it was not the promise to pay, but the breaking of the promise—the default of the makers to pay the debt at the place and time they agreed to pay it—which give rise to the cause of action."

In the absence of a stipulation to the contrary in the contract, fixing some other place of payment, the payment is to be made at the residence of the party to whom payment is due. It is stated thus in *Mass. Bonding and Ins. Co.* v. *Concrete Steel Bridge Co.,* 37 F. 2d 695, 697:

> "The cause of action for breach of a contract, however, arose not upon the execution of the contract,

but upon the failure to make the payments therein provided for. As there was no stipulation in the contract as to where they should be made, *the law implies that they should be made at the place of residence of the creditor*" (Citing) (emphasis supplied).

"A cause of action is held to have arisen in the county of the residence of the person to whom the money due under a policy is payable."

7 Cooley's Brief on Ins. (2d Ed.), 6775.

To the same effect are:

Helmers et al. v. *Anderson*, 156 F. 2d 47.
48 C. J., pp. 592-3.
6 R. C. L., p. 902.
21 R. C. L., p. 17.
Harvey v. *Parkersburg Ins. Co.*, 37 W. Va. 272, 16 S. E. 580.
Clark v. *Policyholders Life Ins. Co.*, 138 Calif. App. 505, 32 Pac. 2d 653.

The respondent was not only a resident of the county and district where the suits were brought, but also the cause of action on which each suit was brought arose in the county and district in Kansas where the suits were brought.

Petitioners Bound by Construction Given Statute by Supreme Court of Kansas.

The petitioners consented to be bound by the construction of the Statute as made by the Supreme Court of Kansas when they executed and filed their consent as a condition precedent to obtain authority to transact business in the State of Kansas.

"Of course, when a foreign corporation appoints one as required by statute, it takes the risk of the

construction that will be put upon the statute and the scope of the agency of the state court" (Citing).

Mitchell Furn. Co. v. *Selden Breck Const. Co.*, 257 U. S. 213, 215-16, 66 L. Ed. 201, 42 S. Ct. 84, 85.

Pennsylvania Fire Ins. Co. v. *Gold Issue M. & M. Co.*, 243 U. S. 93, 61 L. Ed. 610, 37 S. Ct. 344.

However, this Statute had been construed by the Supreme Court of Kansas, as above set forth, long prior to the time when petitioners filed their consent, appointing the Commissioner of Insurance as their statutory process agent.

The Statute Is Available to Litigants in Federal Courts.

It was held in *Neirbo* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165, 84 L. Ed. 167, 60 S. Ct. 153, 128 A. L. R. 1437, that:

> "Since the corporation had consented to be sued in the courts of the state, this Court held that the consent extended to the federal courts sitting in the state. As to diversity cases, Congress has given the federal courts 'Cognizance concurrent with the courts of the several states.' The consent, therefore, extends to any court sitting in the state which applies the law of the state."

The same result was reached in—

Oklahoma Packing Co. v. *Okla. G. & E. Co.*, 309 U. S. 4, 84 L. Ed. 537, 60 S. Ct. 215.

Similar Construction of Statutes of Same Class by Other States and Authorities.

Similar Statutes in other states have been held to give a resident of the state the right to sue a foreign corporation on a cause of action arising outside the state.

"Under Code, W. Va., 1923, Ch. 540, Sec. 20; Ch. 54, Sec. 24(a), authorizing auditor to accept service

on behalf of foreign corporation, authority of auditor is not limited to accepting service in cases where cause of action arose within the state."

Mass. Bonding & Ins. Co. v. *Concrete S. B. Co.*, 37 F. 2d 695.

To the same effect is—

Aetna Cas. & Sur. Co. v. *Gentry*, 191 Okla. 659, 132 Pac. 2d 326, 145 A. L. R. 623, and note.

Globe & Rutgers F. Ins. Co. v. *Brown*, 52 F. 2d 164.

It is stated in 8 Cyc. Ins. Law (Couch), p. 6544, Sec. 1984, that:

"And in the absence of controlling contract provision, or of some applicable statutory regulation to the contrary, a suit may be brought in any state or jurisdiction where the insurer, which issued the policy, can be found, and service had, since an action upon an insurance policy is not local but transitory in its nature, this because a claim of interest under a policy, or certificate of insurance is one of debt, and, as debts have no situs, the action may be brought to recover them in any court in which jurisdiction can be had over the person of the debtor."

* * * * * * *

"Again the Court of any state in which an action may be brought, and process secured on an insurer, may exercise jurisdiction over an action to recover on a policy, though made and delivered in another state, where the property insured thereby was located."

* * * * * * *

"Ordinarily, an action against a non-resident insurer may be properly brought in the county of the plaintiff's residence" (p. 6545).

Decision of Tenth Circuit Not in Conflict with Decisions of Supreme Court of Kansas.

Petitioners claim that the decision of the United States Court of Appeals for the Tenth Circuit is in conflict with *Mutual Reserve Fund Life Assn.* v. *Boyer,* 62 Kan. 31, 61 Pac. 387.

It bears no relation to the facts in the cases now before this Court.

The Mutual Reserve Assn. had at one time been authorized to do business in Kansas and had filed its statutory consent. Thereafter, and "about two years prior to the taking out of the policy in suit, its license had been revoked by the Superintendent of Insurance, since which time it had not maintained any agency or transacted any business of any character whatever in the state."

> "Application was made for the policy in Kansas City, Mo., through an agent whose office was in that city."
>
> "Medical examination of the applicant was made in Kansas City, Mo."
>
> "The policy was executed at the home office of the company in New York, and delivered to the insured in Kansas City, Mo."
>
> "The first premium was paid in that city" (Kansas City, Mo).

What the Court decided, and all it decided, is stated in the syllabus, as follows:

> "The fact that a foreign life insurance company had at one time transacted business in this state under a license issued by the superintendent of insurance, and that it had filed in his office as required by statute its 'written consent, irrevocable,' to the institution of suits against it in the courts of this state and the issuance of summons against it directed to the super-

intendent of insurance, does not subject it to suit in this state on a policy of insurance wholly executed in another state, *if, prior to the issuance of such policy, it had withdrawn or been expelled from this state and had entirely ceased to do business here*" (emphasis supplied).

There is no claim in these cases that prior to the issuance of the policies, the petitioners had withdrawn, or been expelled from the state. In fact, the contrary is admitted and pleaded in the answer and petition.

Even in this case, the Supreme Court of Kansas sent the case back, on the plea in abatement, for a determination of whether, although the company's license to transact business in Kansas had been revoked, and although the company maintained no agency in Kansas, the company nevertheless had been transacting business in Kansas.

There is nothing in this decision contrary to, or in conflict with the decisions of the United States Court of Appeals for the Tenth Circuit.

In the case of *Buchanan* v. *Iowa State Live Stock Ins. Co.*, 108 Kan. 520, 196 Pac. 249, the insurance company's license to transact business in Kansas had been revoked and the insurance company had closed its offices and moved its books, records and effects from Kansas prior to the time the suit was filed.

The suit was brought for damages for malicious prosecution of a criminal action which grew out of a claim, under a policy, for loss of a cow. The insured had been arrested, but the criminal charge was subsequently dismissed. Thereupon he brought this suit for malicious prosecution, and service of summons was had on the Superintendent of Insurance. Motion to quash the service of

summons was overruled, and the Supreme Court held that it was properly overruled.

There is nothing in the case in conflict with the decision of the United States Court of Appeals for the Tenth Circuit.

B. There is no conflict between the decision of the Tenth Circuit and the decision of the Fifth Circuit.

Is there anything in the decision of the United States Court of Appeals for the Tenth Circuit in conflict with the decisions of other Circuits?

The first case relied on by petitioners on this proposition is *Knoblock* v. *M. W. Kellogg Co.*, 154 F. 2d 45 (Fifth Circuit).

A few quotations of facts from the opinion of the Fifth Circuit will demonstrate that there is no conflict between the decision in that case, and the decision of the Tenth Circuit in these cases.

The suit was filed in Texas.

> "The action arose in Louisiana under the Workmen's Compensation Law of that state."
>
> The suit "was brought by a citizen of Louisiana against citizens of Delaware and Connecticut, respectively."
>
> "The question presented for decision was whether the venue was properly laid in the southern district of Texas."
>
> "Nor was it alleged that either defendant was required to have a permit to do business in Texas."
>
> "This action did not arise in Texas or out of facts having any relation to the business then being carried on by the appellees or either of them."
>
> "None of the parties, plaintiff or defendant, to this action was, or is an inhabitant of the southern dis-

trict of Texas, and federal jurisdiction thereof is founded only on the fact that the controversy is wholly between citizens of different states. In these circumstances this suit may be brought in a court of the United States only in the district of the residence of either the plaintiff or the defendants, unless the defendants consented to the venue so laid or waived their federal immunity from suit in a district wherein neither the plaintiff nor the defendant resided."

"It is neither alleged or proven that appellees obtained a permit to do business in Texas or designated a statutory agent for service in the state. There is no proof in the record as to the existence in Texas of any resident agent of either appellee."

None of the parties resided in Texas and the cause of action did not arise in Texas, and finally—

"There being no state decision on the subject, we reject appellant's contention, and construe the Texas statute to apply only to causes of action arising within the state or out of facts relating to business therein transacted."

The Kansas Statute states, and the Supreme Court of Kansas has construed it to mean, that a resident of Kansas may sue a foreign insurance company, authorized to do business in Kansas, either "in the proper court of any county in this state in which the cause of action shall arise *or* in which the plaintiff may reside, by service of process on the Commissioner of Insurance of this state."

C. There is no conflict between the decision of the Tenth Circuit and the decisions of the Supreme Court of the United States.

Two of the cases upon which petitioners rely are—

Simon v. *Southern Railway Co.*, 236 U. S. 115, 35 S. Ct. 255, 59 L. Ed. 492;

and

Old Wayne Mutual Life Assn. v. *McDonough*, 204 U. S. 8, 27 S. Ct. 236, 51 L. Ed. 345.

The decision in each of these cases was rested on what is called "implied consent," that is, the company sued was transacting business in the state where the suit was brought without complying with the Statute, or appointing a statutory process agent.

The inapplicability of these cases to cases like these now before this Court is well stated in *Pennsylvania Fire Ins. Co.* v. *Gold Issue Mining and Milling Co.*, 243 U. S. 93, 37 S. Ct. 344, 61 L. Ed. 610, where the suit was brought in Missouri on a policy of insurance issued in Colorado. The insured mining company was an Arizona Corporation. The property insured was located in Colorado. The defendant was neither a resident of Colorado, Arizona nor Missouri.

Process was served on the Superintendent of Insurance, upon whom, by written consent, defendant had agreed that process could be served.

The insurance company claimed that the service of process was insufficient; that the statute applied only to "suits upon Missouri contracts."

The Supreme Court, after calling attention to the cases of *Old Wayne Mut. Life Assn.* v. *McDonough*, 204 U. S. 8, 51 L. Ed. 345, 27 S. Ct. 236; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115, 38 S. Ct. 255, 59 L. Ed. 492; *Smolik* v. *Phila. & R. C. & I. Co.*, 222 Fed. 148, and *Bagdon* v. *Phila. & R. C. & I. Co.*, 217 N. Y. 432, 111 N. E. 1075, L. R. A. 1916F, 407, held the service good, distinguishing between "implied consent," arising from transacting business in the state, without filing the statutory consent, and "voluntary con-

sent," by complying with the statute, saying, among other things:

> "But when a power actually is conferred by a document, the party executing it takes the risk of the interpretation that may be put upon it by the courts."

In the case of *Robert Mitchell Furniture Co.* v. *Selden Breck Const. Co.*, 257 U. S. 213, 42 S. Ct. 84, 66 L. Ed. 201, the suit was brought after the defendant had ceased to transact business in the state, and the Court's opinion was based on the premise that "unless the state law either expressly or by *local construction* gives to the appointment a larger scope, we shall not construe it to extend to suits in respect of business transacted by the foreign corporation elsewhere at least if begun, as this was, when the long previous appointment of the agent is the only ground for imputing to the defendant an even technical presence," and

> "The indications of the Ohio statutes, so far as they go look to 'liability incurred within the state,' "

and

> "We know of no decisions to the contrary by the Supreme Court of Ohio."

In these cases now before the Court there is an express provision of the statute that service of process may be made on the Commissioner of Insurance, if the action is brought in the county where plaintiff resides, or in the county where the cause of action arose, and the statute has been so construed by the Supreme Court of Kansas.

The case of *Morris & Co.* v. *Skandinavia Ins. Co.*, 279 U. S. 405, 49 S. Ct. 360, 73 L. Ed. 762, is in no way in conflict with the decision of the Tenth Circuit in these cases.

A few quotations from the decision will demonstrate this conclusion.

The plaintiff "was incorporated under the laws of Louisiana."

The suit was filed "in the Circuit Court of Harris County, Mississippi."

"The policy sued on was issued and the loss occurred in South America."

"Neither of the parties was a resident or citizen of Mississippi, and as found by both courts, respondent" (the insurance company) "was not doing business in that state."

"No decision of the State Supreme Court supports the construction for which the petitioner contends."

The loss was not payable in Mississippi.

The cause of action did not arise in Mississippi.

The plaintiff did not reside in Mississippi.

CONCLUSION.

We respectfully submit that:

(a) There is no conflict between the decisions of the United States Court of Appeals for the Tenth Circuit, and the decisions of the Supreme Court of the State of Kansas, but, on the contrary, there is perfect agreement;

(b) There is no conflict between the decision of the United States Court of Appeals for the Tenth Circuit, and the decisions of the Circuit Court of Appeals of the United States for the Fifth Circuit, or of any other Circuit, and

(c) There is no conflict between the decisions of the United States Court of Appeals for the Tenth Circuit, and

the decisions of the Supreme Court of the United States, and

Therefore, that the petition should be denied.

Respectfully submitted,

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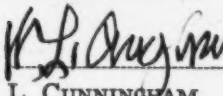
By  ,
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May, 1949.